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CITATIONS

588885—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 102

NORTH CAROLINA FINISHING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 136–143) is reported in 133 F. (2d) 714. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 12–33) are reported in 44 N. L. R. B. 184.

JURISDICTION

The decree of the court below (R. 144) was entered on February 17, 1943. An order extending the time within which to file a petition

for certiorari for thirty days was entered by a Justice of this Court on May 15, 1943 (R. 145). The petition for a writ of certiorari was filed on June 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question presented is whether there is substantial evidence to support the Board's findings that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act, and discriminatorily discharged one Annie Mae Evington in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings the Board, on September 19, 1942, issued its findings of fact, conclusions of law, and order (R. 12–33). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[1]

[1] In the following statement the references preceding the semicolon are to the Board's findings, and the succeeding references are to the supporting evidence. Occasional references to the original transcript of the record are designated "Tr." Exhibits are referred to by number.

When petitioner became aware of the incipient organizational activities of its employees, W. F. Robertson, Jr., its vice president and general manager, called a meeting of the overseers on July 28, 1941, instructed them not to interfere with the organizing compaign, and ordered them to inform the second hands[2] accordingly (R. 16; Tr. 565–566, 615–616, 673–674). These instructions were never communicated to the ordinary employees, and were repeatedly and openly disregarded by the supervisors themselves. Thus, that same afternoon second hand Boston told one of his subordinates that "Mr. Robertson said he hoped the boys would forget about the Union now and not pay someone to dictate to them" (R. 16; 52). A few days later second hand Walser, who had charge of approximately 150 employees in the sewing room (R. 16; 81, 46),[3] stated to a group of 10 or 12 of his subordinates, "Your Union is nothing but run by a bunch of Germans to make you go out on strike for two or three weeks and to hamper defense work" (R. 16–17; 100–101). Walser repeatedly made statements of a comparable nature, both during and after formal organization of the Union (R. 17–18; 101–102, 103–107). He also questioned several employees about their union affiliations (R. 18; 101–102, 103–104, 106–

[2] Second hands are supervisory employees who rank immediately below the overseers (R. 16; 116).

[3] There were only about 900 employees in the entire plant (Tr. 12–13).

107), and on one occasion asked an employee whether she had been solicited by Annie Mae Evington (R. 18; 106), who was found by the Board to have been discriminatorily discharged (*infra*, pp. 4–8). Furthermore, Walser warned one of his subordinates that "the Company has sense enough to give a good reason" for discharging a union member (R. 17; 104–105).

The Board found that the widespread anti-union activities of Walser and Boston discouraged petitioner's employees from membership in the Union because they indicated petitioner's opposition to such membership (R. 18–19). By the acts of these supervisors, the Board concluded, petitioner restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (*ibid.*).[4]

Annie Mae Evington was first employed by petitioner in 1938 as an inspector and folder of sheets in the sewing room. After December 1940 she worked under the supervision of second hand Walser and overseer Grubb inspecting sheets and performing other duties (R. 22; 109–110). She joined the Union on August 1, 1941, and became the most active female employee in its behalf (R. 22; 110, 97–98, 105, Bd. Exh. 12). She attended

[4] "As a part of the 'totality of the company's activities'," the court below noted (R. 140) that other supervisors also engaged in anti-union conduct (Adams, R. 107–109, 124, Union Exhs. 1, 2; Brinkley, R. 102–103, 114–115).

union meetings regularly, solicited and signed up members, wore her union button to work, and acted on various union committees (R. 22; 98–99, 110–111, Bd. Exh. 6). On August 17 she was elected recording secretary and was the only female employee ever to hold office in the Union (R. 22; 99, Bd. Exh. 3). Second hand Walser was aware of her prominent union activities. He saw her wearing her union button at work, learned from questioning other employees that she had solicited them for membership in the Union, and on September 15 read in a union paper distributed at the plant that she had been elected recording secretary (R. 22; 83–85, 99–100, 106). On September 25 Walser discharged Evington at the request of overseer Grubb (R. 24; 81, 109).

As an inspector Evington had the duty of detecting and removing defective sheets, classified as "seconds" or "thirds" (R. 22; Tr. 20). When Walser discharged Evington he informed her that she was being fired because "her percentage on her 'thirds' was higher than any of the other girls" (R. 21–22; 90–91, 81). In support of its contention at the Board hearing that Evington was discharged for passing more "thirds" than any other inspector (R. 22–23; 64, 81, 90–91), petitioner relied upon certain records it had kept (R. 22–23; 81–82, 90–91, 121, Tr. 28–32, Bd. Exhs.

4, 5). These records, however, show that during the period covered by them the largest number of "thirds" was passed by a nonunion inspector, Mary Doby, and the second largest number by Evington and one other girl (R. 23, 25; Bd. Exhs. 4, 5). Furthermore, 2 of the 11 "thirds" charged against Evington were placed upon the records subsequent to her discharge, so an examination of the records on September 25, 1941, would have shown 7 inspectors with totals as great as, or greater than, Evington's (R. 24–25; 93, Bd. Exhs. 4, 5).

In any event, as the Board found, "the records do not inspire confidence in their accuracy" (R. 28). Thus, about 50 percent of the times Walser charged the inspectors with "thirds," he did so without showing them the defective sheets or the records (R. 27–28; 81–82, 38–39). Indeed, the last time Evington was shown the records, there were only five "thirds" marked against her (R. 28; 111–112). In addition, there were unexplained erasures of certain notations on the records (R. 25; 92–93, Bd. Exh. 5). Furthermore, there were inconsistencies in the testimony of Walser and Grubb as to when and how the totals on "thirds" were ascertained and entered on the record sheet (R. 24–25, 28; 93, 122–123). There were also discrepancies in the testimony of Walser and Grubb as to when and how they had gathered the statistics on the number of days

inspectors had worked during the record period (R. 25–26, 28–29; 87–93, 118–119, 123–124).[5]

This unreliable method of keeping the records of "thirds," and Walser's and Grubb's conflicting accounts of the techniques by which they concluded that Evington had passed the most "thirds" (R. 24–26, 28–29; 87–93, 64, 118–119, 122–124), persuaded the Board that petitioner "did not make a good faith effort to determine which of the inspectors had passed the greatest number of 'thirds'" (R. 28–29).[6]

Other facts found by the Board equally support its conclusion that "the real reason for Evington's dismissal was the [petitioner's] opposition to her known union activity" (R. 29). Thus, second hand Walser had previously stated that the Company would have "sense enough to give a good reason" for discharging a union member (R. 17, 27; 104–105), had inquired about Evington's solicitation of union memberships (R. 18, 27; 106), and had learned a few days before her dismissal that Evington had been elected to union office (R. 22, 27; 83–85, 99–100). Moreover, the

[5] There was also evidence that about a month before Evington's dismissal Walser charged her with two "thirds" which had in fact been passed by another inspector (R. 113), and that other inspectors complained of similar errors (R. 74, cf. 38–39).

[6] The Board also noted that on October 1, 1941, three working days after Evington's discharge, there were a number of girls who had passed as many "thirds" as she (R. 28; 120–122).

customary punishment for passing too many "thirds" was merely a disciplinary 2-week layoff; Evington was the first inspector ever to be discharged for this offense (R. 23, 27; 83, 84–85, 86–87, 119–120). Also, other inspectors were given individual warnings to improve their inspection, but no such personal notice was given Evington (R. 23–24, 27; 113, 117–118, 61, 73). Finally, Doby, the nonunion employee who had the highest number and greatest percentage of "thirds" according to petitioner's records, was not discharged until a day after Evington's dismissal (R. 25–26; 86, Tr. 357–358, Bd. Exhs. 4, 5, 15). Doby was generally known as a poor worker, had been absent on many occasions without notifying petitioner, and had previously been laid off for passing too many "thirds" (R. 26, 29; 85–86, 113–114, 119–120). There was, furthermore, a conflict in Walser's and Grubb's explanations of petitioner's failure to discharge Doby until after Evington was dismissed (R. 25–26, 28–29; 90–91, 49–50, 64, 122).

The Board found that petitioner discouraged membership in the Union by its discriminatory discharge of Evington, thereby violating Section 8 (3) and (1) of the Act (R. 29). The Board's order directed petitioner to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to Evington, and to post appropriate notices (R. 31–33).

Thereafter petitioner filed a petition to review in the court below (R. 125–131), and the Board answered requesting enforcement (R. 132–135). On February 17, 1943, the court handed down its opinion (R. 136–143) and entered its decree (R. 144) enforcing the Board's order in full.

ARGUMENT

Petitioner's contention (Pet. 7–23) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–9) affords full support for the challenged findings.[7] Contrary to petitioner's contention (Pet. 7–12), it is clearly responsible for the anti-union conduct of its supervisors.[8] The Company's unenforced instructions of impartiality were not communicated to the employees and therefore did

[7] While petitioner criticizes (Pet. 16, 19–20) two subsidiary findings in the Board's decision as contrary to uncontradicted testimony, the Court need "not stop to consider these contentions, since, without such findings, there would still be a basis in the record for the Board's conclusions." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 247.

[8] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 519–520; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79–80; *Solvay Process Co.* v. *National Labor Relations Board*, 117 F. (2d) 83, 85 (C. C. A. 5), certiorari denied 313 U. S. 596; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 44 (C. C. A. 6).

not neutralize the normally coercive effects of such conduct upon the employees.[9]

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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[9] See *Heins*, *Solvay* and *Consumers Power* cases cited *supra*, note 8.